81-1735

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE G. GARCIA,

Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, et al.

On Appeal From The United States District Court For The Western District of Texas

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a public transit system is an example of a traditional operation performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services, which would entitle the transit system to immunity from Fair Labor Standards Act coverage.

2. Whether a transit system that has been converted from private to public ownership and has been the recipient of, and been dependent upon, substantial federal capital and operating grants pursuant to the Urban Mass Transportation Act, is entitled to Tenth Amendment immunity from Fair Labor Standards Act coverage on the ground that the services in question are those which the states have traditionally afforded their citizens and are services which state and local governments are created to provide.

3. Whether it is apparent that a public transit system's compliance with the Fair Labor Standards Act would impair the state's ability to structure integral operations in an area of traditional function.

PARTIES BELOW

The parties to the proceedings in the United States District Court for the Western District of Texas were: San Antonio Metropolitan Transit Authority, plaintiff; American Public Transit Association, plaintiff-intervenor; The Honorable Raymond J. Donovan, Secretary of Labor of the United States (who was substituted for F. Ray Marshall, the incumbent when the action commenced), defendant; and Joe G. Garcia, defendant-intervenor.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Western District of Texas (App., 1a-3a) is not officially reported, but appears at 25 Wage and Hour Cases (PNA) 274.

JURISDICTION

The appellee, San Antonio Metropolitan Transit Authority, instituted a declaratory judgment action against the Secretary of Labor, alleging that the minimum wage and overtime provisions of the Fair Labor Standards Act could not constitutionally be enforced against appellee by virtue of the Tenth Amendment. Subject matter jurisdiction was founded on 28 U.S.C. §§ 1331 and 1337.

The judgment of the district court, declaring that the Secretary of Labor cannot apply or seek to enforce the Fair Labor Standards Act against appellee or any other local public mass transit system, was entered on November 17, 1981. The notice of appeal was filed with the clerk of the district court on December 16, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1252. *Donovan* v. *Richland County Assn.*, —— U.S. ——, 102 S. Ct. 713 (1981) (per curiam).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have the power . . . .
>
> • • •
>
> To regulate commerce . . . among the several States . . . .

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*

§ 203 Definitions

As used in this chapter —

* * *

(d) "Employer" . . . includes a public agency . . .

* * *

(r) "Enterprise" means the related activities performed . . . for a common business purpose . . . . For purposes of this subsection, the activities performed by any person or persons —

* * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a state or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

§ 207. Maximum Hours

(a)(1) . . . no employer shall employ any of his employees who . . . is employed . . . for a workweek longer than forty hours unless such employee receives com-

pensation . . . at a rate not less than one and one-half times the regular rate at which he is employed.

• • •

Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1601 *et. seq.*

§ 1601. Declaration of findings and purpose

(a) The Congress finds —

• • •

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are —

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

• • •

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public and private mass transportation companies as determined by local needs.

§ 1601a. Additional declaration of findings and purpose

• • •

It is the purpose of this Act to create a partnership which permits the local community, through federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements.

• • •

§ 1601b. Additional declaration of funding

The Congress finds that —

• • •

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service as the continued increase in its cost to the user is undesirable . . . .

• • •

(7) immediate substantial federal assistance is needed to enable many mass transportation systems to continue to provide vital service.

• • •

§ 1602. Federal financial assistance

• • •

Private transit operators

(e) No financial assistance shall be provided under this chapter to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of, a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after July 9, 1964) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to the program of projects required by section 1607 of this title, (2) the

Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 1609(c) of this title.

• • •

§ 1604. Urban Mass transit grant program

• • •

Limitation on amount of grants for construction and operating expense projects; source of remainder of funds for projects

(e) The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. The remainder shall be provided in cash, from sources other than Federal funds or revenues from the operation of public mass transportation systems. Any public or private transit system funds so provided shall be solely from undistributed cash surpluses, replacement or depreciation funds or reserves available in cash, or new capital.

• • •

§ 1609. Labor Standards

• • •

Interests of employees; protective arrangements; terms and conditions

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

STATEMENT OF THE CASE

Transit Operations in San Antonio

Appellee, San Antonio Metropolitan Transit Authority ("SAMTA"), a political subdivision of the State of Texas, commenced operations as a public transportation system on March 1, 1978.

Public ownership of transit in San Antonio actually began on May 1, 1959 when the City of San Antonio created the San Antonio Transit System ("SATS") and bought the San Antonio Transit Company, a private bus company.

During its first decade of operations, the SATS had been a money-making venture whose operations were governed by the terms of a revenue bondholders' indenture.[1] During this time the transit system was able to operate without any type of government subsidy.

However, as set forth in a statement prepared for delivery to the Subcommittee on Housing of the House Comm. on Banking and Currency, on March 10, 1970, F. Norman Hill, general manager of SATS, remarked that the system had recently experienced an operating loss for the first time in its history. Mr. Hill, who was speaking in support of H.R. 16261,[2] on behalf of the American Transit Associa-

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1. The National Bank of Commerce of San Antonio, acting as the bondholders' trustee, was the depository for all of the system's revenues and would release monthly operating funds to the system in accordance with the annual budget. As of March 1, 1978, when SAMTA assumed transit operations, the bonds were paid in full.

2. H.R. 16261 (see, 116 Cong. Rec. 5785 (1970)) was one of several bills introduced that session "to provide long-term financing for expanded urban mass transportation programs, and for other purposes" — wording that became the preamble to the Urban Mass Transportation Act of 1970, P.L. 91-453, which, in part, amended the Urban Mass Transportation Act of 1964, P.L. 88-365, 49 U.S.C. § 1601 *et. seq.*

tion, concluded that "[i]f we do not receive substantial help from the federal government, San Antonio may one day join the growing ranks of cities without public transportation."

Shortly after this prediction that its survival would depend on federal aid, SATS became the recipient of a capital grant by the Urban Mass Transit Administration in the amount of $4,122,666.[3] Over the next 10 years SAMTA and its predecessor, SATS, received $51,689,000 in federal capital and operational grants, accounting for approximately 40 percent of its total project costs of $130,922,194. And during its first two fiscal years, since its creation in March 1978, SAMTA has benefitted from $12,500,000 in federal funds.

Transit Operations in the U.S.

Mass transit operations in San Antonio are generally typical of the pattern in the nation. Traditionally, the transit industry in the United States has been operated by private companies. See, e.g., *Division 1447, Amalgamated Transit Union* v. *Louisville and Jefferson County Transit*, 659 F. 2d 722, 723 (6th Cir. 1981). At the time of the Second World War only 35 transit systems carrying 7% of transit riders, were publicly owned. AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 55 (1978-79 ed.). By December, 1960, the number of publicly owned systems increased slightly to 64. But 95% of the 1251 transit systems in the country remained privately owned.[4] While the San Antonio system, which had gone public the

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3. Project No. TX03005, approved December 23, 1970.

4. H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2590.

previous year, was ranked among the 5% of transit systems in the public realm, for more than a decade it continued to be operated profitably under the aegis of private bondholders.

In 1964 Congress enacted the Urban Mass Transportation Act (UMTA), P.L. 88-365, 78 Stat. 302, 49 U.S.C. § 1601 *et. seq.* Both the House and Senate were impressed by the need for improvements in passenger transportation in urban areas which posed a problem national in scope: "Mass transportation needs have outstripped the present resources of the cities and states, and a nationwide program can substantially assist in solving transportation problems." H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2569, 2573. Likewise the Senate Committee on Banking and Housing made the following observations in favorably reporting out the bill (S.6):

> THE FEDERAL RESPONSIBILITY
>
> The improvement of passenger transportation in urban areas is one of the major problems facing the country today. The need for Federal assistance has long been recognized . . . .
>
> • • •
>
> *Mass transportation needs have outstripped the present resources of the cities and States, and a nationwide program can substantially assist in solving transportation problems. The Federal Government cannot ignore these problems.* The continued economic vitality and growth of our urban areas is essential to our national welfare. Indeed, the welfare of all our citizens is directly dependent upon the commerce and industry of our cities.

> *There are, of course, a number of other reasons why this problem involves a considerable measure of Federal responsibility.*
>
> *For one thing, the problem of providing adequate urban mass transportation service has long ago spilled over the boundaries of many local political jurisdictions. In fact, it has spilled over a good many State boundaries.* Some 54 of our 200-odd metropolitan areas either border on or cross over State lines. The financial difficulties of the State and local governments are even more acute than the jurisdictional difficulties. Most of our cities are faced with rising service costs and declining tax bases.
>
> • • •
>
> It is for these reasons that the leadership and financial assistance of the Federal Government is needed now to encourage solutions that are forward looking and generally applicable to urban areas regardless of size.

(S. Rep. No. 82, 88th Cong,, 1st Sess., 12-14 (1963) ("S. Rep."); emphasis supplied).

Although "States and local public bodies and agencies thereof" are the only applicants who are eligible for federal assistance under UMTA (49 U.S.C. § 1602(a)(1)), Congress, when enacting this legislation, was well aware that transit in the United States was largely a function of private enterprise. Thus, Congress concurred in the 1962 transportation message from President Kennedy which stated that "[t]he program is not intended to foster public as distinguished from private mass transit operations."[5]

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5. S. Rep., p. 19. H.R. Rep. No. 204, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2567, 2581.

Congress recognized, nevertheless, that public acquisition of private mass transit systems should be an available option and made provision for this contingency in the Act:

> No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after the date of the enactment of this Act) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of this Act.
>
> (49 U.S.C. § 1602(e)).

As originally enacted the federal commitment under UMTA was up to two-thirds of the "net project cost"[6] of a capital undertaking. Section 301(a) of the Federal-Aid

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6. "Net Project Cost" is defined as "the cost of a project . . . that cannot be reasonably financed from revenues." 49 U.S.C. § 1603(a).

Highway Act of 1973 (P.L. 93-87) raised the federal share from two thirds of the net project cost to 80 percent. H.R. Rep. No. 93-118, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 1859, 1901-02. The National Mass Transportation Assistance Act of 1974 (P.L. 93-503) further amended UMTA by authorizing federal subsidies to defray 50% of operating deficits. (49 U.S.C. § 1604(e).)

During the period 1965 through September 30, 1979, nearly $12½ billion in capital grants alone were provided and between fiscal years 1975-1979 operating grants under UMTA exceeded $2.6 billion. These federal subsidies make manifest the Congressional declaration that "the purpose of this Act [is] to create a partnership which permits the local community through federal financial assistance, to exercise the initiative to satisfy its urban mass transportation requirements." 49 U.S.C. § 1601a.

The availability of these federal outlays under UMTA has proven to be the incentive that has accelerated public takeovers of transit systems.[7] "Faced with the possibility of unprofitable private transit systems ceasing operations and the incentive of federal government financial assistance, many municipalities adopted public ownership of their transit systems."

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7. D. Barnum, FROM PRIVATE TO PUBLIC: LABOR RELATIONS IN URBAN MASS TRANSIT (1977). ("Barnum"). According to a July 1979 study by The Department of Transportation there were 647 transit operations in urbanized areas (over 50,000 population) nearly evenly divided between public and private ownership: 320 privately owned and 327 publicly held. URBAN MASS TRANPORTATION ADMINISTRATION, A DIRECTORY OF REGULARLY SCHEDULED FIXED ROUTE LOCAL PUBLIC TRANSPORTATION SERVICE 17 (1979).

AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 56 (1978-79 ed.).[8]

The Fair Labor Standards Act

Historically, then, the transit industry in this country was an overwhelmingly private undertaking, and, as employers, these private transit operations were subject to the National Labor Relations Act and the Fair Labor Standards Act. *Amalgamated Ass'n. etc.* v. *Wisconsin Employment Rel. Bd.*, 340 U.S. 383 (1951); *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497 (1950).[9] In those jurisdictions where a transition from private to public ownership has occurred, comparative studies have not revealed marked

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8. A number of municipalities have, nonetheless, decided to contract the management and operation of their publicly owned systems to private management companies under what is known as the "Memphis formula." Barnum, *supra*, at 33; *See e.g., Division 1235, ATU* v. *Metro. Transit Auth.*, 650 F. 2d 1389, 1390 (6th Cir. 1981).

9. At the time of the enactment of UMTA, many state laws contained prohibitions against collective bargaining in the public sector. Mindful that conversion from the private to public realm could leave transit employees without any safeguards, Congress from the outset sought to impose federal labor standards on the transit industry as it evolved as a consequence of federal funding. This Congressional concern is manifested in Section 13(c) of UMTA, 49 U.S.C. § 1609(c), which provides in material part:

> It shall be a condition of any assistance . . . that fair and equitable arrangements are made . . . to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to . . . (1) the preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights . . . .

See, *Division 1285, ATU* v. *Jackson Transit Auth.*, 650 F. 2d 1379, 1387 (6th Cir. 1981), *cert. granted*, 50 USLW 3436 (No. 81-411).

differences in the structure of labor relations between the public and private realms. In 1977, Barnum reported:

> The statistical tests show that, between 1965 and 1971, public systems paid neither higher nor lower wages than their private counterparts. In addition, there was no consistent difference in wages whether the public system was owned by an independent authority or was part of the City Government; if the system was operated by its public owner or by contract with a private management company; and whether the system was newly public or had been so for a number of years. (Barnum, *supra,* 130-131.)[10]

Thus, on or about the effective date of the 1974 amendments to the Fair Labor Standards Act, extending the Act to a public agency like the San Antonio Transit System, the system issued the following "special notice":

> . . . San Antonio Transit System bus operators will be paid at the rate of time and one-half (1½) for all actual straight time hours worked in excess of 48 hours in a pay week. This does not apply to *regular operators* already receiving time and one-half (1½) on a daily basis for work performed in excess of his regular run, nor to regular and extra operators who qualify for and receive time and one-half (1½) for all work performed on their days of rest. * * *

On October 15, 1976, however, the system issued another "special notice" to the transit system's employees, discontinuing overtime pay except when due "in accordance with the Memorandum of Working Conditions for Hourly-Paid Employees." According to the transit system it no

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10. The Amalgamated Transit Union, which represents over 100,000 employees in the transit industry, including SAMTA's employees, has found, through its own research, that only a handful of operations in the country do not pay an overtime rate.

longer had to pay overtime at a time and one-half rate because, SATS alleged, in an allusion to the Court's decision in *National League of Cities* v. *Usery,* the Supreme Court had declared that the FLSA "does not apply to state and local government employees."

Proceedings Below

Thereafter, in response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, the Wage and Hour Administration of the Department of Labor rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WH-499, dated September 17, 1979, *reprinted in* Wage Hour Manual (BNA) 91:1138-1140).

On November 21, 1979, SAMTA filed this action for declaratory judgment against the Secretary of Labor seeking a determination that SAMTA was exempt from the provisions of the FLSA.[11] On December 21, 1979, the Secretary of Labor amended Section 775.3(b) of the regulation (Code of Federal Regulations, Title 29, Part 775), to include "local mass transit systems" as one of a list of "functions of a State or its political subdivision [that] are not traditional." (44 Fed. Reg. 75628.)

SAMTA moved for summary judgment asserting that a public mass transit system performs "an integral operation

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11. On that same date appellent Joe C. Garcia, and fellow employees, had instituted an action in the district court against SAMTA for overtime pay under the FLSA. (*Garcia* v. *SAMTA,* SA 79 CA 458.) That suit was stayed pending disposition of the constitutional challenge herein. Garcia immediately sought to intervene here. His motion to intervene was granted just before the court's ruling on summary judgment.

in areas of traditional governmental functions" and by virtue of *National League of Cities* the FLSA "cannot be constitutionally applied to it." Alternatively, SAMTA argued that the decision in *National League of Cities* precludes enforcement of the FLSA against any state or local governmental body in the absence of a Congressional reenactment of a constitutionally valid amendment to that Act. The Secretary of Labor thereafter filed its motion for partial summary judgment, contravening both constitutional challenges raised by SAMTA. On November 17, 1981, the district court granted SAMTA's motion for summary judgment, finding that "local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional functions . . . and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act. . . ."[12] Consequently, the Department of Labor's classification of a public mass transit system as not being an integral operation in an area of traditional governmental functions (29 CFR 775.3(b)(3)) was held to be "null and void." (App., 1a-3a).

On January 19, 1982, the district court ordered stayed pending appeal that portion of its judgment which enjoined the Secretary of Labor from applying or seeking to enforce the FLSA against all other public mass transit systems in the nation.

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12. The district court denied Intervenor Garcia's motion to stay summary judgment proceedings to give him a chance to take discovery, since he had just been allowed to intervene.

THE QUESTIONS ARE SUBSTANTIAL

A. The Issue Is One of National Importance.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (herein *NLC*), the Court, for the first time in four decades, held a Congressional regulation of commerce to be an unconstitutional intrusion upon the sovereignty of state and local governments. The factors underlying the decision have been described as oblique. *Florida Dept. of Health* v. *Florida Nursing Home Ass'n*, —— U.S. ——, 101 S. Ct. 1032, 1036, n. 10 (Stevens, J., concurring).

There were eight specific activities[13] identified in *NLC* as being "within the area of traditional operations of state and local governments" for purposes of immunity from compliance with the FLSA. 426 U.S. at 851. In the six years since *NLC* was decided, the lower federal courts have been left to grapple with the rather abstract terms of the immunity principle — "integral operations in areas of traditional government functions" — formulated by this Court.[14] The tests employed by the lower courts admittedly have not been uniform. *Compare, Amersbach* v. *City of Cleveland*, 598 F. 2d 1033, 1037 (6th Cir. 1979), *with, Alewine* v. *City Council of Augusta*, 505 F. Supp. 880, 888-89 (S.D. Ga. 1981).

The decision below, extending the coverage of *NLC* to an industry that, by virtue of federal financing, is being trans-

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13. Fire protection, police protection, sanitation, public health, parks, recreation, schools and hospitals. 426 U.S. at 846-47, 851, 855. This listing was not deemed to be exhaustive. *Id.*, at 851, n. 16.

14. On remand, the district court noted that the opinion had left open "a gray area, which will require elucidation in the factual settings presented by future cases." *Nat'l League of Cities* v. *Marshall*, 429 F. Supp. 703, 706 (D.D.C. 1977); *See also, Fry* v. *U.S.*, 421 U.S. 542, 558 (1975) (Rehnquist, J., dissenting).

formed from privately to publicly owned enterprises throughout the country, extended *NLC* both too far and in the wrong direction.

The court below decided erroneously two very important issues left after *NLC*. First, the Court wrenched the standard of traditional activity in *NLC* from its moorings in history; second, the Court found determinative state sovereignty concerns in a program that is a product of private user financing and cooperative federalism and whose labor relations are largely governed by federal law. These holdings raise recurring and complex constitutional issues, which this Court alone can address definitively.[15]

Appeals by public transit employees are now pending in three circuits from district court decisions that they are not entitled to overtime pay under the FLSA: *Dove* v. *Chattanooga Area Regional Transportation Authority*, No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. September 30, 1981); *Kramer* v. *New Castle Area Transit Authority*, No. 80-1008G (W.D. Pa. June 11, 1981), *appeal docketed*, No. 81-2223 (3rd Cir. August 10, 1981); *Alewine* v. *City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal docketed*, No. 81-7490 (11th Cir. June 5, 1981). A contrary holding, finding that a public transit line was not an integral operation in an area of traditional function was rendered by the district court in *Joiner* v. *City of Macon*, No. 79-287-MAC (M.D. Ga. April 27, 1981), *appeal docketed*, No. 81-7789 (11th Cir. September 30, 1981), *consolidated with*,

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15. During the course of oral argument in *United Transportation Union* v. *Long Island Railroad*, No. 80-1295, the Court was informed that this case was headed here.

Alewine, supra. Moreover, as these cases arise in an employment relations setting — with a potential impact on the livelihood of thousands of public transit employees — it is particularly important to resolve these issues in an area where there is a need for stability and consistency.

B. The District Court Deviated From NLC and the Post-NLC Decisions of This Court.

The district court entered judgment for SAMTA without any analysis of the unique historical and legal status of mass transit systems in this nation. The district court was content to parrot the *NLC* immunity standard and conclude that public mass transit systems constitute "integral operations in areas of traditional governmental functions", enjoining the Secretary of Labor from enforcement of the FLSA against any public transit system in the United States.

This rather perfunctory treatment of the issues controverts the Court's decision of just last term in *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n.*, —— U.S. ——, 101 S. Ct. 2352 (1981), that a claim of Tenth Amendment immunity under *NLC* must be subjected to rigorous judicial scrutiny:

> [I]n order to succeed, a claim that Congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.* at 854. Second, the federal regulation must address matters that are *indisputably* attributes of state sovereignty. *Id.* at 845. And, third, it must be apparent that the States' compliance with the federal law would *directly impair* their ability to struc-

> ture *integral operations in areas of traditional functions.* (101 S. Ct. at 2366; emphasis in original and added.)

The restrictive gloss placed upon *NLC* by *Hodel* is manifest. The cloak of immunity is only available if the federal legislation, *inter alia,* "would directly impair [the States'] ability to structure integral operations in areas of traditional functions." This is a demanding standard of proof — "it must be apparent" — that the Court has imposed on a public body.

There is, however, nothing on the record which makes it "apparent" that SAMTA's payment of time and one-half for hours worked in excess of 40 per week would "directly impair [its] ability to structure integral operation in areas of traditional functions."[16] To the contrary, regarding impairment, the record reflects that for several years transit system employees in San Antonio were paid a premium rate for overtime without any apparent disruption of service. Not surprisingly, SAMTA contended that it was irrelevant whether compliance with the FLSA would impair its operations. However, *Hodel* is to the contrary.

Second, the record Garcia was able to elicit reflects that SAMTA and transit generally are more like proprietary enterprises than traditional sovereign prerogatives. Long privately owned and operated, even the publicly owned SATS was answerable to a trustee for the private bondholders, and SAMTA is still substantially financed by

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16. Appellant Garcia was forclosed by the district court from engaging in discovery. What little information it was able to garner about SAMTA's operation was elicited under the Texas public information statute.

fares. The decision here, ignoring the substantial evidence elicited and cutting off Garcia's discovery, cannot be reconciled with this Court's other pronouncements on the scope of *NLC*.[17]

The one activity the *NLC* Court described as not "an integral portion of those governmental services which the states and their political subdivisions have traditionally

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17. In this regard the Chief Justice's observations in his concurring opinion in *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 423-424 (1978), are most pertinent:

> The *National League of Cities* opinion focused its delineation of the " 'attributes' of sovereignty" alluded to above on determination as to whether the State's interest involved "functions essential to separate and independent existence.' " *Ibid.*, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580, 31 S. Ct. 688, 695, 55 L. Ed. 853 (1911). *It should be evident, I would think, that the runnning of a business enterprise is not an integral operation in the area of traditional governmet functions.* See *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 695-696, 96 S. Ct. 1854, 1861-62, 48 L. Ed. 2d 301 (1976); *Bank of United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907, 6 L. Ed. 244 (1824). Indeed, the reaffirmance of the holding in *United States* v. *California, supra*, by *National League of Cities, supra*, 426 U.S., at 854 n. 18, 96 S. Ct., at 2475, strongly supports this understanding. Even if this proposition were not generally true, the particular undertaking at issue here — the supplying of electric service — has not traditionally been the prerogative of the State. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 352-353, 95 S. Ct. 449, 454, 42 L. Ed. 2d 477 (1974). (Emphasis supplied.)
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> Justice Rehnquist in dissent in *Fry* v. *U.S., supra*, likewise opined "that the traditional distinction between 'governmental' and 'proprietary' activities might in some form prove useful . . ." 421 U.S. at 558. Cf. *Cabell* v. *Chavez-Salido*, —— U.S. ——, 102 S. Ct. 735, 740 (1982) (distinction between the economic and political functions of government). *Ball* v. *James*, — U.S. —, 101 S. Ct. 1811 (1981). *See*, Tribe, *Unraveling National League of Cities*, 90 Har. L. Rev. 1065, 1076-7 (1977).

afforded their citizens," 426 U.S. at 855, was a public rail transportation line:

> The holding of *United States* v. *California*, as opposed to the language quoted in the text, is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . . ." 297 U.S., at 182, 56 S. Ct., at 423.
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> For the same reasons, despite Mr. Justice BRENNAN's claims to the contrary, the holdings in *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964), and *California* v. *Taylor*, 353 U.S. 553, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957), are likewise unimpaired by our decision today.

(*Id.* at 854 n. 18).

In *Helvering* v. *Powers*, 293 U.S. 214 (1934), the Court had held that a local elevated railway system, supported by public funds, is a "nature" of "enterprise" that is "distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the states." 293 U.S. at 227. Thus, mass transit services have not traditionally been the province of the states or their political subdivisions. As outlined earlier, the provision of these services was relegated to the private sector.

Third, the recent public acquisitions of mass transit systems, as well as the survival of public transit operations like SAMTA, are beholden to the capital and operational assistance made available by the *federal* government under the Urban Mass Transportation Act. The only public tradition of mass transit service is that of a joint undertaking

between the federal and state governments: [T]he purpose of [UMTA is] *to create a partnership* which permits the local community, through Federal financial assistance, to exercise the initiative to satisfy its urban mass transportation requirements." 49 U.S.C. § 1601a. (Emphasis supplied.)

Consequently, the displacement of state sovereignty, a concern of the Court in *NLC*, is precluded by *the substantial federal interest in mass transit.* By virtue of this substantial federal involvement, local public mass transit constitutes a program of "cooperative federalism" and "[i]n this respect . . . resembles a number of other federal statutes that have survived Tenth Amendment challenges . . . ." *Hodel, supra* at 2366.

In sum, the decision here, applying the *NLC* holding to SAMTA, with no local public tradition, largely resembling a proprietary activity and involving a federal presence critical to such public involvement as exists, would extend *NLC* far beyond its necessary or desirable scope and skew the analysis of any other applications irretrievably.

CONCLUSION

For the reasons set forth above the Court should note probable jurisdiction.

Respectfully submitted,

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